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2014 IL App (3d) 110839-U

Order filed February 13, 2014

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IN THE  
APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2014

THE PEOPLE OF THE STATE	)	Appeal from the Circuit Court
OF ILLINOIS,	)	of the 9th Judicial Circuit,
	)	Warren County, Illinois,
Plaintiff-Appellee,	)	
	)	Appeal No. 3-11-0839
v.	)	Circuit No. 10-CF-130
	)	
PAUL L. BURTON,	)	Honorable
	)	Raymond A. Cavanaugh,
Defendant-Appellant.	)	Judge, Presiding.

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JUSTICE OBRIEN delivered the judgment of the court.  
Presiding Justice Lytton and Justice Holdridge concurred in the judgment.

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**ORDER**

- ¶ 1 *Held:* (1) The State's improper impeachment of defendant on cross-examination regarding his prior convictions unfairly prejudiced defendant; (2) the trial court's abuse of discretion in limiting the cross-examination of the alleged victim regarding her motive to testify falsely resulted in manifest prejudice to defendant; (3) defendant's trial counsel provided ineffective assistance; and (4) the cumulative effect of the errors during defendant's trial warranted a reversal of defendant's conviction and a remand for a new trial.
- ¶ 2 Following a jury trial, defendant, Paul L. Burton, was found guilty of aggravated criminal sexual abuse. 720 ILCS 5/12-16(c)(1)(i) (West 2008). Defendant was sentenced to four years of imprisonment. On appeal, defendant argues that this court should reverse his conviction and

remand for a new trial because: (1) the State's error in cross-examining defendant regarding his prior convictions for domestic battery unfairly prejudiced him; (2) the trial court's abuse of discretion in precluding defendant from cross-examining B.B. as to her preference to live with her father as a possible motive to testify falsely resulted in manifest prejudice to defendant; and (3) defendant's trial counsel was ineffective due to suffering side effects of recent chemotherapy treatment, which contributed to counsel's failure to file a motion *in limine* to preclude introduction of defendant's prior convictions into evidence. We reverse and remand for a new trial.

¶ 3

### FACTS

¶ 4 Defendant, who was over the age of 17, was charged with aggravated criminal sexual abuse for fondling the vagina of B.B., who was under the age of 13. In her opening statement, the prosecutor indicated that B.B. was eight years old at the time of the offense and would testify that in the fall of 2009, she was asleep on the couch in her home when defendant, her mother's boyfriend, lay next to her and touched her vagina. In his opening statement, defense counsel told the jury they had to determine the credibility of all the testifying witnesses and "[s]omebody is going to be telling you an untruth." Defense counsel indicated that defendant's testimony would show that defendant was credible. Defense counsel also indicated that Misti B., the mother of B.B. and 14-year-old S.N., would testify that B.B. and S.N. were not credible.

¶ 5 B.B. testified that one evening in September of 2009, she was asleep on the floor and defendant picked her up and placed her on the couch. Defendant lay next to B.B. and placed his hand down her pants and touched her vagina. B.B. told defendant she had to go to the bathroom and ran upstairs. A few days later, B.B. told S.N. about the incident. B.B. told Misti about the incident after S.N. told B.B. to do so. Defendant subsequently moved out of the home but returned a few days later.

¶ 6 On cross-examination, the State generally objected to defense counsel questioning B.B. as to her preference for living with her father. Defense counsel argued that the line of questioning "goes to motive[.]" The court sustained the State's objection.

¶ 7 On redirect examination, the assistant State's Attorney questioned B.B. as follows:

"Q. And you didn't make any of this up, did you?

A. No.

Q. And you wouldn't make something like this up to go live with your father?

A. No.

Q. Why do you prefer living with your father?

A. Because my mom doesn't care if [defendant] does that and my dad does."

B.B. explained that her father cared if someone touched her inappropriately.

¶ 8 S.N. testified that the incident at issue occurred in the fall of 2009 on a school night.

B.B. and S.N. went to bed on the living room couches at 10 or 11 o'clock at night. S.N. awoke at 2 a.m. Defendant was pacing around while he was on the telephone. S.N. tried to go back to sleep. S.N. did not see defendant on the couch with B.B. S.N. assumed that defendant returned to the bedroom he shared with Misti. When S.N. looked over at B.B. she saw "a big pile of blankets." B.B. subsequently ran out of the room saying that she had to go to the bathroom. At that point, defendant was on the couch where B.B. had been. S.N. ran after B.B. B.B. indicated that she had to go to the bathroom because "her stomach felt like she was going to explode." B.B. did not seem upset and was "actually smiling." S.N. testified that defendant married Misti following the incident in question.

¶ 9 Officer Joey Hull testified that on June 9, 2010, B.B.'s father had contacted the police to report allegations regarding defendant touching B.B. B.B. was interviewed the following day. A video recording of B.B.'s interview was entered into evidence.

¶ 10 During the interview, B.B. indicated that she lived with Misti in an apartment in Illinois during the school year and spent the summers at the home of her father in Missouri. In Illinois, she lived with Misti, S.N., and defendant. At her father's home, she lived with her father, stepmother, and G.R. (age 11), A.B. (age 10), A.E. (age 7), J.B. (age 2) and A.B. (under 1 year).<sup>1</sup> When asked what she liked to do for fun, B.B. indicated that she enjoyed playing video games with her brothers and sisters.

¶ 11 During the interview, B.B. indicated that defendant touched her in her "private area" on two separate occasions while her mother was at work. The incidents occurred one year apart, with each incident occurring after she had returned from spending the summer with her father. Both incidents took place on a couch in B.B.'s bedroom<sup>2</sup> after S.N. left the room. Defendant put his hand down B.B.'s pants and touched the outside of her vagina. He kept his hand down her pants, touching her vagina, until her mother came home. When Misti came home, defendant took his hand out of B.B.'s pants and left the room. Defendant did not move his hand while he was touching B.B. or do anything else. After B.B. told Misti about the incident, Misti said that defendant would move out of the apartment and never return. Defendant moved out after both incidents but returned a few days later each time. B.B. stated:

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<sup>1</sup> The record is not clear as to whether and in what capacity the children in the home were related.

<sup>2</sup> The record indicates B.B. and S.N. slept on the living room couches and B.B. considered it to be her bedroom.

"That's why I want to stay here [at my dad's home]. My mom doesn't know about it, but I really do because I'm safer here."

¶ 12 Misti testified that she lived in a three-bedroom apartment with defendant, B.B., and S.N. Misti's two friends and their son also lived in the apartment. S.N. and B.B. often slept on the couches in the living room.

¶ 13 On November 29, 2009, B.B. told Misti that defendant touched her inappropriately the night prior when Misti worked an overnight shift. B.B. said that defendant stuck his hand down her pants. When Misti had left for work the evening prior, B.B. was already asleep on the floor. When Misti returned the next morning, B.B. was sleeping in the kids' bedroom upstairs. Misti did not report the incident because B.B.'s story "kept changing" and "she's been known in the past to lie and made up big stories that were untrue." Misti did not believe B.B.'s allegations. B.B.'s father had been attempting to get custody of B.B. since 2008.

¶ 14 Defendant testified that one evening in November of 2009, while Misti was at work, he watched a movie with B.B. and S.N. in the bedroom he shared with Misti. Normally, B.B. and S.N. slept on the couches in the living room. After the movie ended at 12:30 a.m., defendant told B.B. and S.N. to go to bed. They went to the living room and lay down on the couches. Defendant left his bedroom to get something to drink and saw B.B. lying on the floor and S.N. lying on the couch. Defendant returned to his bedroom. Defendant did not touch B.B. inappropriately and never stuck his hand down her pants at any point. Defendant testified that he drank two beers that evening but was not intoxicated. On cross-examination, defendant confirmed that he had a 2005 aggravated domestic battery conviction and a 2007 felony domestic battery conviction.

¶ 15 The jurors began deliberations at 11 a.m. At 12:10 p.m., the jury asked "when did [B.B.] leave to her father's the summer of 2010, the specific date?" The court responded that they were

only to consider the evidence that was presented at trial. Jurors also asked, "what if we cannot come to one hundred percent agreement." The court's response was that the jurors should continue to deliberate in an attempt to reach a unanimous verdict. The jury requested to view the video recording of B.B.'s interview twice during their deliberations. At 4:27 p.m., the jury reached a verdict, finding defendant guilty of aggravated criminal sexual abuse.

¶ 16 The trial court sentenced defendant to four years of imprisonment. Defendant was also ordered to submit a deoxyribonucleic acid (DNA) sample and pay a \$200 DNA assessment.

¶ 17 Defense counsel filed motions for a new trial, in which he alleged his own ineffective assistance of counsel. The court appointed new counsel, who filed an amended motion for a new trial.

¶ 18 At the hearing on the motion for new trial, defense counsel testified that he failed to present evidence of previous unfounded allegations of a similar nature that B.B. made against one of Misti's previous boyfriends. Defense counsel testified that the issues would have been best handled by a pretrial motion *in limine*, but he failed to do so.

¶ 19 Defense counsel additionally testified that the week prior to defendant's trial he underwent chemotherapy treatment. During defendant's trial, counsel was taking chemotherapy and anti-seizure medications. He experienced fatigue, and the medications affected his ability "to communicate with people effectively and to think clearly." He did not file a motion to continue defendant's trial and objected when the State requested a continuance due to one of its witnesses being unavailable. Defense counsel opposed the continuance because defendant was anxious to resolve the case and counsel believed it would be advantageous to proceed while the State's witness was unavailable. Additionally, defense counsel was confident that defendant would be found not guilty.

¶ 20 In ruling on the motion for a new trial, the trial court indicated, "Many of the decisions of the defense, call them defense tactics, did raise the eyebrow of the Court[.]" The trial court noted that the case "was far from perfectly tried" and was a "close case." The trial court denied defendant's motion for new trial because the evidence was sufficient to prove defendant guilty beyond a reasonable doubt when viewed in the light most favorable to the State.

¶ 21 Defendant appealed.

¶ 22 ANALYSIS

¶ 23 On appeal, defendant argues that this court should reverse his conviction and remand for a new trial because: (1) the State's error of questioning on cross-examination regarding defendant's prior convictions unfairly prejudiced him; (2) the trial court's abuse of discretion in precluding defendant from cross-examining B.B. as to her preference to live with her father as a possible motive to testify falsely resulted in manifest prejudice; and (3) defendant's trial counsel was ineffective due to suffering side effects of recent chemotherapy treatment, which contributed to counsel's error in failing a motion *in limine* to preclude defendant's prior convictions from being entered into evidence.

¶ 24 I. Improper Impeachment with Prior Convictions on Cross-Examination

¶ 25 Defendant argues that he was denied a fair trial when the prosecutor improperly asked whether he had been previously convicted of aggravated domestic battery in 2005 and felony domestic battery in 2007. Defendant acknowledges that he forfeited our review of this issue by failing to object in the trial court. See *People v. Enoch*, 122 Ill. 2d 176 (1988) (a defendant must make a contemporary objection and raise the issue in a posttrial motion to preserve the issue for review). However, defendant requests that we review the issue under the plain error doctrine. See *People v. Thompson*, 238 Ill. 2d 598 (2010) (the plain error rule bypasses forfeiture principles and allows a reviewing court to consider unpreserved claims of error).

¶ 26 Plain error applies to a forfeited error where a clear or obvious error occurred, and (1) the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, or (2) the error is so serious that it affected the fairness of the trial and challenged the integrity of the judicial process. *Thompson*, 238 Ill. 2d 598. In undertaking a plain error analysis, we must first determine whether error occurred. *People v. Wilmington*, 2013 IL 112938.

¶ 27 Here, the State concedes its error in presenting defendant's prior convictions during cross-examination of defendant for impeachment purposes. Proof of prior conviction for the purpose of impeachment is made only by the introduction into evidence on rebuttal of the record of conviction or a certified copy of the conviction. *People v. Nelson*, 275 Ill. App. 3d 877 (1995) (citing *People v. Kosearas*, 408 Ill. 179 (1951)), *People v. McCrimmon*, 37 Ill. 2d 40 (1967); *People v. Depper*, 256 Ill. App. 3d 179 (1994). A defendant is prejudiced when he is compelled to testify before a jury as to his prior convictions. *Nelson*, 275 Ill. App. 3d 877. Therefore, error occurred when the State questioned defendant regarding his prior convictions on cross-examination.

¶ 28 We address the question of whether the error requires reversal and remand for new trial under the first prong of the plain error analysis because the evidence in this case was closely balanced. The evidence consisted mainly of the conflicting testimony of defendant and B.B. as to whether defendant inappropriately touched B.B. The jury's determination of defendant's guilt was largely based upon a comparison of defendant's credibility against the credibility of B.B. Consequently, questioning defendant as to his prior convictions likely tipped the scales of justice against defendant.

¶ 29 II. Limitation on Defendant's Cross-Examination of B.B.



¶ 30 Defendant additionally argues that the trial court erred by limiting his cross-examination of B.B. A defendant has a right under both the United States and the Illinois Constitution to confront witnesses against him. U.S. Const., amends. VI, XIV; Ill. Const. 1970, art. I, § 8. A criminal defendant's fundamental constitutional right to confront the witnesses against him includes the right to conduct a reasonable cross-examination of witnesses concerning biases, prejudices, or ulterior motives. *People v. Davis*, 185 Ill. 2d 317 (1998) (citing *Olden v. Kentucky*, 488 U.S. 227 (1988)). The widest latitude should be give to the defense on cross-examination when trying to establish a witness's bias or motive. *People v. Boand*, 362 Ill. App. 3d 106 (2005) (citing *People v. Ramey*, 152 Ill. 2d 41 (1992)).

¶ 31 To prevail on a claim that the defendant was denied a sufficient opportunity to confront a witness at trial on cross-examination, the defendant must demonstrate that the court's limitation was an abuse of discretion resulting in a manifest prejudice. *People v. Britt*, 265 Ill. App. 3d 129 (1994); *People v. Nutall*, 312 Ill. App. 3d 620 (2000). When the theory of the defense is the lack of credibility on the part of the prosecution's witness, it is error for the court to deny the defense an opportunity to explore issues on cross-examination that would reasonably expose the witness's bias, interest, or motive. *People v. Green*, 339 Ill. App. 3d 443 (2003).

¶ 32 In this case, defendant attempted to cross-examine B.B. regarding her desire to live with her father as a motive to testify falsely. The trial court should have given defense counsel the widest latitude in questioning B.B. to expose in a motive or bias for accusing defendant of inappropriately touching her. Therefore, the trial court abused its discretion in limiting the cross-examination of B.B.

¶ 33 Although a trial court improperly denies a defendant his constitutional right to cross-examination, the error may not always mandate a reversal and, instead, be found harmless. *Davis*, 185 Ill. 2d 317. Whether such an error is harmless depends on factors such as: (1) the

importance of the witness's testimony in the prosecution's case; (2) whether the testimony was cumulative; (3) the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points; (4) the extent of cross-examination otherwise permitted; and (5) the overall strength of the prosecution's case. *Id.*

¶ 34 Here, B.B.'s statements were the only evidence that defendant touched her inappropriately. The evidence presented against defendant in this case was not strong. The questions from the jury during deliberations indicate that the State's case was not overwhelming. The outcome of this case was largely based upon a determination of witnesses' credibility. Therefore, it was crucial that defendant's counsel be allowed to conduct a reasonable cross-examination of B.B. concerning her biases, prejudices, or ulterior motives. Consequently, we cannot say that the trial court's abuse of discretion in limiting defendant's cross-examination of B.B. as to a possible motive to testify falsely was harmless.

¶ 35 III. Ineffective Assistance of Counsel

¶ 36 Defense counsel admitted to a diminished physical capacity during his representation of defendant due to his recent chemotherapy treatment. Defense counsel testified that he made some poor decisions during the trial due to his diminished physical capacity and those decisions were not a matter of sound trial strategy.

¶ 37 Defendant argues that his trial counsel's performance amounted to ineffective assistance. See *Strickland v. Washington*, 466 U.S. 668 (1984) (defense counsel is ineffective where: (1) his performance fell below an objective standard of reasonableness; and (2) the deficient performance prejudiced defendant). Here, defense counsel erroneously failed to file a motion *in limine* to prevent defendant's convictions from being introduced into evidence for impeachment purposes because the domestic battery convictions had no direct relationship to defendant's credibility. See *People v. Williams*, 161 Ill. 2d 1 (1994) (felonies that have no direct relationship

to credibility should not be admitted for impeachment purposes). Due to the evidence being closely balanced and defendant's defense theory being based on witness credibility, counsel's failure to prevent the jury from hearing evidence of defendant's prior convictions had a substantial prejudicial impact on defendant's case.

¶ 38

#### IV. Cumulative Effect of Errors

¶ 39 Even if the above-mentioned individual errors did not each merit reversal, the cumulative effect of the errors in this case do so because defendant was deprived of a fair trial. See *People v. Blue*, 189 Ill. 2d 99 (2000). This was a closely balanced case, the outcome of which was based on the jury's determination of the witnesses' credibility. Defendant's credibility was damaged by the errors of the State questioning him regarding his prior convictions and the trial court's limitation on the cross-examination of B.B. The damage to defendant's credibility, compounded with the admitted errors of defendant's counsel in failing to preclude evidence of defendant's prior convictions for impeachment purposes, deprived defendant of a fair trial. Consequently, due process and fundamental fairness require that we reverse defendant's conviction and remand for a new trial.

¶ 40

#### V. DNA Analysis

¶ 41 To avoid duplicating the error on remand, we note that it was improper for the trial court to order defendant to submit a DNA sample and pay a \$200 DNA analysis assessment. Taking a defendant's DNA sample and the imposition of the analysis fee is only authorized when defendant's DNA is not on file in the State's DNA database. *People v. Marshall*, 242 Ill. 2d 285 (2011). Defendant claims, and the State concedes, that defendant's DNA profile is in the State's DNA database.

¶ 42

#### CONCLUSION

¶ 43 For the foregoing reason, the judgment of the circuit court of Warren County is reversed, and the cause is remanded for a new trial.

¶ 44 Reversed and remanded.